FILED BY CLERK
FEB 25 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MIGUEL OCHOA-FUENTES and ROSALVA FIGUERO-BONILLA, Plaintiffs/Appellees, v. CHARLES T. BLANCHETTE, Defendant/Appellant.	2 CA-CV 2009-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV20080321

Honorable Robert Duber II, Judge

VACATED AND REMANDED

Lloyd & Robinson, PLLC
By Arthur E. Lloyd and Doris Wait — Payson
Attorneys for
Plaintiffs/Appellees

Charles T. Blanchette — Phoenix
In Propria Persona

E S P I N O S A, Presiding Judge.

¶1 Defendant/appellant Charles Blanchette appeals from the trial court's entry of default judgment against him and its award of $15,168.09 to plaintiffs/appellees

Miguel Ochoa-Fuentes and Rosalva Figuero-Bonilla (plaintiffs). For the reasons set forth below, we vacate the judgment and remand for further proceedings.

Factual Background and Procedural History

¶2 Blanchette owned a mobile home and entered into a written contract to sell it to Alonzo Chavez under a "lease option agreement." Chavez apparently assigned his rights in the mobile home to plaintiffs and they continued to make the monthly payments to Blanchette. In March 2008, a car driven by Pamela Collins crashed into the mobile home, severely damaging it. Collins's insurance company subsequently paid Blanchette $21,499 to settle the claim. However, despite repeated requests, Blanchette refused to either repair the mobile home or provide plaintiffs with any of the insurance proceeds, but continued to accept their monthly payments.

¶3 In late August, 2008, plaintiffs' attorney wrote to Blanchette at his Payson address, threatening to file suit against him. On September 7, 2008, Blanchette sent a response to plaintiffs' counsel by facsimile. In this letter, Blanchette denied having any liability to plaintiffs, but offered to repair the mobile home if plaintiffs agreed to certain conditions. Plaintiffs filed a complaint against Blanchette on September 16, 2008. Shortly thereafter, Blanchette called plaintiffs' counsel, who informed him that a lawsuit had been filed against him and asked if he would accept service of the summons and complaint. Blanchette responded that he did not think he needed to do anything and also said "something to the effect" of "'good luck in finding me,'" according to plaintiffs' counsel's affidavit. Blanchette was told he would have to pay for the cost of service of

process and that if they were unable to locate him, he would be served by publication and a default judgment would be entered against him. Blanchette again responded that he did not think he needed to do anything.

¶4 During the remainder of September and into October, plaintiffs attempted to personally serve Blanchette at multiple locations: his condominium in Payson, three different times at a Phoenix address, and four times at a Texas address. In November and December 2008, plaintiffs' counsel published a copy of the summons in the *Arizona Silver Belt*, a local newspaper apparently located in Globe, Arizona.

¶5 Meanwhile, in a letter dated October 22, 2008, Blanchette informed the Gila County Superior Court Clerk that he was named as a defendant in the *Ochoa-Fuentes v. Blanchette* case filed on September 16, 2008, that he had not yet been served, and that he would be out of the country from October 23, 2008, through March 1, 2009. The clerk subsequently informed him that his letter could not be placed into the case file without a filing fee, and Blanchette mailed the fee to the court on November 5. The clerk two days later returned the fee with a letter explaining that because Blanchette had not been served, the fee could not be accepted, but that his letter would nevertheless be placed in the case file.

¶6 On January 13, 2009, plaintiffs applied for entry of default, requested a damages hearing, and mailed a copy of their filing to Blanchette's Phoenix address. Default was entered against Blanchette but the trial court refused to set a damages hearing because the file contained correspondence from Blanchette from a Texas address

and plaintiffs had, apparently, failed to submit an affidavit "showing circumstances warranting service by publication."[1] Plaintiffs' counsel responded by filing an affidavit outlining the attempts to serve Blanchette at the Texas address as well as the two Arizona addresses and renewed plaintiffs' request for a damages hearing.[2] Upon receipt of plaintiffs' counsel's affidavit, the trial court set a hearing on damages and default judgment.

¶7 About a week before the hearing, Blanchette filed a motion entitled, "Opposition to Motion for Default Judgment and Damages," in which he claimed he had returned to Arizona in March and thereafter saw correspondence informing him of the upcoming default damages hearing. In his motion and attached declaration, Blanchette argued plaintiffs had failed to properly serve him by publication, that he had "advised the clerk in advance of his planned absence," and that "the entry of default or a judgment" would be "manifestly unfair." Blanchette appeared in propria persona at the hearing and was one of several witnesses who testified. At the beginning of the hearing, the trial

[1]Plaintiffs' counsel's subsequent "Affidavit of Default" stated that it was accompanied by "[a] copy of the Affidavit of Publication previously filed with the court." However, the record does not include this document and it appears to have never been filed in light of the court's statement that the file did not contain such an affidavit.

[2]In order to serve a party located within Arizona by publication, the party making service must comply with the procedural requirements set forth in Rule 4.1(n), Ariz. R. Civ. P. One of these requirements mandates that the party making service mail a copy of the complaint and summons to the residence of the party to be served, as well as certify to the court in an affidavit the manner and date of such mailing or that the mailing was not made because the residence was unknown. Ariz. R. Civ. P. 4.1(n). Significantly, this affidavit did not state that plaintiffs' counsel had mailed the complaint and summons to Blanchette's residence nor did it state that his residence was unknown.

court informed Blanchette that his liability had already been established through default and that he could only address the amount of damages. Blanchette testified that as of August 20, 2008, approximately $14,570 remained owing on the lease option agreement.

¶8 Default judgment against Blanchette was filed on June 1, 2009. In the judgment, the trial court found that plaintiffs had made "diligent attempts to serve" Blanchette and therefore service by publication "was warranted and justified." The court also conveyed Blanchette's interest in the mobile home to plaintiffs and entered judgment against him in the amount of $6,929, "which represents the difference between the insurance proceeds received by Defendant Blanchette and the balance owed by the Plaintiffs for the purchase of said mobile home." The court also found that the matter "arose out of contract" and awarded plaintiffs attorney fees in the amount of $7,697.50 and costs of $541.59 pursuant to A.R.S. § 12-341.01(A).

¶9 Following the hearing, but before default judgment had been entered, Blanchette filed a motion entitled, "Motion to Set Aside Default Judgment," based on Rule 60(c), Ariz. R. Civ. P. In an unsigned minute entry dated June 1, 2009, and filed June 3, 2009, the trial court denied Blanchette's motion, finding he had deliberately evaded service of process. Blanchette filed a notice of appeal identifying only the trial court's June 1, 2009, judgment.

Discussion

¶10 At the outset, we first address this court's jurisdiction and the scope of this appeal. *See Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007,

1008 (App. 1997) (appellate court has independent duty to determine its jurisdiction). Because the trial court denied Blanchette's motion to set aside the default judgment in an unsigned minute entry and Blanchette's notice of appeal included only the default judgment itself, the trial court's denial of Blanchette's motion to set aside the default judgment is not before us. *See Haywood Secs., Inc. v. Ehrlich*, 214 Ariz. 114, ¶¶ 1, 9, 149 P.3d 738, 738-40 (2007) (orders and judgments appealable only if signed by judge); *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 181, 680 P.2d 1235, 1242 (App. 1984) (unsigned minute entry orders not appealable).[3]

¶11 This leaves Blanchette's appeal of the default judgment. Although a default judgment is generally not appealable, *see Kline v. Kline*, 221 Ariz. 564, ¶ 11, 212 P.3d 902, 906 (App. 2009), a party may seek appellate relief "when there is a question regarding personal or subject matter jurisdiction, or when there is a question regarding the validity of the default judgment pursuant to Ariz. R. Civ. P. 55." *Id.*; *see also Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311-12, 666 P.2d 49, 56-57 (1983).

¶12 Because Blanchette challenges his service by publication, which is, in effect, a challenge to the trial court's jurisdiction, *see Postal Instant Press, Inc. v. Corral Rest., Inc.*, 186 Ariz. 535, 537, 925 P.2d 260, 262 (1996), this court has jurisdiction of this appeal, *see Hirsch*, 136 Ariz. at 311-12, 666 P.2d at 56-57 (direct appeal of default judgment allowed to contest lack of personal jurisdiction). "If a defendant is not properly

[3]Although this matter could be remanded to the trial court for a signed minute entry, *see, e.g., In re Herbst*, 206 Ariz. 214, ¶ 13, 76 P.3d 888, 890 (App. 2003), we decline to do so here because the notice of appeal fails to identify this issue.

served with process, any resulting judgment is void," *Hilgeman v. Am. Mortgage Secs., Inc.*, 196 Ariz. 215, ¶ 8, 994 P.2d 1030, 1033 (App. 2000), and we would have "no discretion but to vacate it," *Martin v. Martin*, 182 Ariz. 11, 14, 893 P.2d 11, 14 (App. 1994); *see also Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 262, 798 P.2d 395, 400 (App. 1990) (default judgment void if trial court failed to obtain personal jurisdiction over defendant). We review de novo the issue of the trial court's jurisdiction over the person. *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 8, 66 P.3d 70, 72 (App. 2003).

¶13 Rule 4.1(n), Ariz. R. Civ. P., allows for service by publication:

> [w]here the person to be served is one whose residence is unknown to the party seeking service but whose last known residence address was within the state, or has avoided service of process, and service by publication is the best means practicable under the circumstances for providing notice of the institution of the action, then service may be made by publication in accordance with the requirements of this subpart.

As noted earlier, the rule further requires that a copy of the summons and complaint be mailed to the defendant's residence, if known. Ariz. R. Civ. P. 4.1(n); *Ritchie v. Salvatore Gatto Partners, L.P.*, No. 1 CA-CV08-0800, ¶ 9, 2010 WL 20608 (Ariz. Ct. App. Jan. 5, 2010). Blanchette contends that the service by publication was defective because plaintiffs failed to send the summons and complaint to him as required.

¶14 "Completion of service of process is the event which brings the party served within the jurisdiction of the court." *Postal Instant Press, Inc.*, 186 Ariz. at 537, 925 P.2d at 262. "Conversely, as long as service remains incomplete, or is defective, the

court never acquires jurisdiction." *Id.* "The law presumes that actual or constructive notice via publication is not received until all conditions of Rule 4.1(n) have been met." *Ritchie*, 2010 WL 20608, ¶ 12; *cf. Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, ¶ 15, 90 P.3d 1236, 1239-40 (App. 2004) ("[S]ervice by publication is . . . sufficient when a plaintiff has exercised due diligence to personally serve a resident defendant at a last known address within the state and has complied with the publication procedures of Rule 4.1(n).").

¶15 Citing *McClintock v. Serv-Us Bakers*, 103 Ariz. 72, 436 P.2d 891 (1968), and *Austin v. State ex rel. Herman*, 10 Ariz. App. 474, 459 P.2d 753 (1969), plaintiffs respond that Blanchette's letter to the court and his payment of an answering fee constituted his appearance in the lawsuit. We disagree. As the court in *Austin* stated, "'An appearance is ordinarily an overt act by which a party comes into court and submits himself to its jurisdiction. It is an affirmative act requiring knowledge of the suit and an intention to appear.'" 10 Ariz. App. at 477, 459 P.2d at 756, *quoting Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 874 (W.D. Pa. 1961) (citations omitted). An act does not constitute a general appearance "'if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, [a]nd no affirmative action is sought from the court.'" *Id.*

¶16 The court in *Austin* held that a defendant's letter to the court, in which she stated she would be unable to attend a scheduled hearing, "clearly indicat[ed] that she did not intend to make an appearance in th[e] case." *Id.* In *Skates v. Stockton*, 140 Ariz. 505,

683 P.2d 304 (App. 1984), on the other hand, this court determined that the defendant's letter to the court, in which he had informed the court that he was out of the country on military service and requested a stay, constituted a general appearance, in part because the letter had requested affirmative relief. *Id.* at 506-07, 683 P.2d at 305-06. Here, Blanchette's letter is more akin to that in *Austin* because it only served to inform the court of his extended absence, did not request affirmative relief, and specifically noted that he had not been served. Furthermore, his payment of the filing fee was made at the court's request in order to place his letter in the case file and was later returned by the court because Blanchette had not been served.

¶17 In addition, this is not a situation where the plaintiffs' failure to comply with the procedural requirements was harmless; it appears Blanchette never received a copy of the complaint and summons and thereafter an entry of default and default judgment were entered against him. As a consequence, this case is distinguishable from those in which the court waived technical defects in service where the defendants had received the summons and complaint. *See, e.g.*, *Creach v. Angulo*, 189 Ariz. 212, 215-16, 941 P.2d 224, 227-28 (1997) (failure to follow technical rule of service was harmless error where record demonstrated defendants had been personally served with summons and complaint); *cf. Kline*, 221 Ariz. 564, ¶ 21, 212 P.3d at 908 (explaining "strict technical compliance with rules governing service may be excused when the court has already acquired jurisdiction over the receiving party and that party receives actual, timely notice" of contents of pleading to be served). Finally, in their answering brief,

appellees do not address their failure to comply with this procedural requirement, let alone argue that their failure to do so was harmless or otherwise excusable.[4]

¶18 Although we are sympathetic to plaintiffs' situation and in no way condone Blanchette's apparent evasion of service, we are left with no choice but to vacate the trial court's default judgment due to the defective service by publication. In light of this conclusion, we do not address the other issues raised on appeal. *See Gabel v. Tatum*, 146 Ariz. 527, 529, 707 P.2d 325, 327 (App. 1985) (no need to reach other issues where case dismissed for lack of jurisdiction).

[4]In addition, as previously noted, the record does not contain plaintiffs' counsel's affidavit supporting service by publication and instead only contains his affidavit filed in response to the trial court's refusal to set a default damages hearing. But Rule 4.1(n) requires "[t]he party or officer making service [to] file an affidavit showing the manner and dates of publication and mailing, and the circumstances warranting the utilization of the procedure authorized by this subpart, which shall be prima facie evidence of compliance herewith." Accordingly, the absence of this affidavit not only contravenes the rule, but would also render the subsequent entry of default against Blanchette invalid. *Cf. Sprang*, 165 Ariz. at 262, 798 P.2d at 400 (where affidavit fails to properly support service by publication, trial court fails to obtain jurisdiction over defendant). And even assuming the subsequent affidavit could cure the Rule 4.1(n) violation, it is unclear whether it adequately sets forth the due diligence necessary for service by publication. *See Sprang*, 165 Ariz. at 262, 798 P.2d at 400 ("finding of due diligence prior to service by publication is a jurisdictional prerequisite"). Furthermore, as outlined above, the affidavit supporting service by publication is required to state that counsel has mailed the summons and complaint to Blanchette's place of residence, *see* Ariz. R. Civ. P. 4.1(n), yet plaintiffs' counsel's affidavit failed to include this information.

Disposition

¶19 For the foregoing reasons, we vacate the trial court's entry of default judgment and remand for further proceedings consistent with this decision.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge